United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1413

To be argued by
DAVID S. GOULD

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1413

UNITED STATES OF AMERICA,
Appellee,

—against—

JERRY WAYNE NEAL,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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Assistant United States Attorneys,
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Preliminary Statement

Appellant appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Costantino, *J.*) entered December 12, 1975 after a jury trial which convicted appellant of two counts of a three count indictment, to wit: that within the Eastern District of New York appellant knowingly and unlawfully possessed an unregistered sawed off shotgun (Count Two) and knowingly and unlawfully possessed a shotgun (the same weapon) with an obliterated serial number (Count Three), both in violation of 26 U.S.C. §§ 5861(d) and (h).[1] Appellant was sentenced to concurrent terms of imprisonment of three years on each

[1] Appellant was acquitted of Count One of the indictment which charged that he had engaged in unlicensed dealing of firearms and ammunition in violation of 18 U.S.C. § 922(a)(1).

count. Execution of sentence has been stayed pending appeal and appellant is presently at large on bail.

On this appeal, appellant contends that the district court committed reversible error in refusing to instruct the jurors that they must acquit appellant if they found that the government supplied the shotgun which appellant "sold" to the agent. The fact that appellant was at all times ready and willing to engage in the criminal transactions charged in the indictment, and did unlawfully possess and transfer a sawed-off shotgun is, opposing counsel argues, irrelevant.

It is the position of the government that, as a matter of fact, the government did not supply the contraband weapon which appellant illegally possessed, and as a matter of law, even if the government informant had supplied the contraband, the government's alleged activity in no sense rises to the level of "outrageous conduct" violative of due process.

Statement of the Case

The Prosecution's Case

As adduced from the testimony of Agent Frank McCann (Bureau of Alcohol, Tobacco and Firearms), his first contact with appellant Jerry Wayne Neal occurred on February 13, 1975. Joe, a Government informant, made the introduction at the Hotel Collingwood where Joe lived and where Neal was employed as a bellman.

Agent McCann ("Xavier") inquired of Neal: "Do you know why I'm here?" Neal replied, "Yes I do" (27-28).[2]

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[2] Numerals in parentheses refer to pages of the transcript.

Thereupon Neal led the agent to a stairwell where they could confer alone. Agent McCann told Neal that he was buying guns for the Irish Republican Army, to which Neal responded that he did not care where the weapons went so long as he made money. Neal mentioned that he had a source for guns in Brooklyn and North Carolina and could obtain sawed-off shotguns and Saturday night specials. Agent McCann agreed to purchase a sawed-off shotgun but, at the same time, voiced a preference for heavy caliber handguns. They agreed on a time and place for a sale, with Neal expressing the hope that they would have a long and fruitful relationship (25-32).

Following the initial meeting, Neal met with Agent McCann eight more times and sold him a .32 caliber Clark Technicore revolver (on February 25, 1975), and a sawed-off shotgun (February 28, 1975) (36, 38, 45, 60-69, 76).

On three occasions Neal failed to deliver the illegal weapons he had promised (92). Each time he offered an excuse to Agent McCann in an effort to maintain McCann's interest in continuing negotiations for future purchases (92-96). During some of their meetings, Neal advised Agent McCann that the price would be less if he bought the weapons in quantity (61-64), and urged Agent McCann to advance him large sums of money for that purpose. Agent McCann did not supply the requested money.

At no time during any of the meetings between appellant and Agent McCann did appellant state any reluctance to deal in illegal firearms (93). Much to the contrary, appellant did everything possible to keep the negotiations going by promising McCann quantities of pistols and shotguns (94) as well as talking about and bargaining over prices of various weapons (*See e.g.*, 31, 46, 67, 224). At no time did he tell McCann he did not wish to

meet with him any more (85). Nor did he ever state that the informant or anyone else was coercing him in any way to engage in the sale of illegal firearms (85). As appellant himself stated, his one and only motive for dealing in firearms was to make money (28, 84).

Of all of the meetings between appellant Neal and Agent McCann, three were of particular significance. On February 25, 1975, they met on 49th Street in Manhattan, Agent McCann accompanied by the informant and Neal by an unidentified male. At the meeting, appellant sold the agent a .32 caliber Clark Technicore revolver and added some ammunition free of charge which McCann had not even requested.[3] Since Neal had been less than reliable in delivering on his promises of gun sales in the past he gave McCann a "good price" of $65 for the handgun as a gesture of good faith so that McCann would not break off the negotiations (38-45).

The sawed-off shotgun was sold to Agent McCann by appellant early in the morning of February 28, 1975. The day before, on February 27, at about 4:30 P.M., Agent McCann had met alone with appellant at the Hotel Collingwood. Neal pulled Agent McCann aside to a small corner near the reception desk and offered to sell him a sawed-off shotgun. Agent McCann readily agreed to the offer. Neal then stated that as soon as his shift ended at midnight, he would go to Brooklyn to get the gun from his source. Neal told McCann to meet him at 2 A.M. at a recruiting station on Fulton Street in Brooklyn (47-48, 96).

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[3] The handgun was not a weapon required to be registered pursuant to federal law. However, the sale of the handgun and ammunition were admitted as evidence pursuant to the count charging appellant with being a dealer in firearms.

Agent McCann arrived at the appointed locale at about 1:44 A.M., and soon thereafter, appellant arrived in his car with Joe. An unidentified friend of Neal's (not the same person Neal brought with him when he sold Agent McCann the handgun on February 25) was also present (48-49). McCann dismissed Joe and appellant's friend. They walked around the block and did not return until after the sale had been completed (49).

After Joe and the unidentified male departed, appellant pointed out a .12 gauge Marlin shotgun in the back well of his car. The barrel of the weapon had been sawed off to 4 3/4 inches and the serial number had been obliterated. After some haggling over price, appellant sold the rifle with twenty-four rounds of .12 gauge ammunition to Agent McCann for $225 (50, 60, 61). Once the sale was consummated, appellant again attempted unsuccessfully to persuade Agent McCann to advance large amounts of money so that appellant could buy weapons in quantity. However, McCann did agree to keep in touch with appellant (51-62, 98).

The last meeting between Agent McCann and Neal took place on April 4th at a coffee shop near the Collingwood Hotel. At the previous meeting, Agent McCann's back-up team had staged a mock arrest of McCann after they had moved in to arrest appellant, erroneously thinking he had made a sale of an illegal weapon to McCann that evening (71-76). Agent McCann brought JoAnn Kocher, an undercover ATF Agent, to this April 4th meeting and introduced her as his girlfriend. McCann told Neal that in view of the previous arrest,[4] it would be safer for him to deal through McCann's "girlfriend"

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[4] Agent McCann had told appellant that the "drugs" the agents allegedly found on him (McCann) turned out to be talcum powder so he had been released (75-76).

in the future. Appellant Neal readily agreed to the new arrangement.

During the course of the ensuing conversation, appellant, without prompting from either ATF agent, suggested a method of transacting business to Agent Kocher. He offered to bring firearms in a valise to a restaurant or movie theatre; she could then take the firearms into the ladies' room to examine them. He also stated he might have a handgun for sale on April 7, 1975 (76-79).[5] Agent McCann called him on that date, but Neal did not have the weapon.

Thereafter, McCann conferred with his supervisor and obtained an arrest warrant for the apprehension of appellant (79-80). Agent McCann arrested Neal at the Hotel Collingwood on April 10, 1975. After being given his Miranda warnings, appellant stated that he had found the sawed-off shotgun he sold McCann in a garbage can (80-84).

Defendant's Case

The theory of appellant's defense at trial was that he was entrapped into committing the crime for which he was convicted.

The sole witness for the defense was appellant Neal. He admitted selling Agent McCann the shotgun, handgun and ammunition as charged in the indictment (123-124). He admitted telling Agent McCann he had returned a promised gun to his source for safekeeping (138). He testified that he "may have" told McCann he could get more guns (137), and that he "may have"

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[5] Agent Kocher also testified to the facts of the April 4th meeting.

stated to McCann he had a source for guns (137). He did not remember if he had ever informed McCann that he did not deliver a promised sawed-off shotgun because his source had just sold the last two (138-139). He alleged he told Agent McCann these things because McCann "kept bugging me" (138).

According to appellant's version, he first become involved with Joe while Joe was living at the Hotel Collingwood. One day while Neal was helping Joe change rooms, Joe suddenly pulled what looked like a M-16 from under his bed and told Neal that "he (Joe) was in the business of selling guns." He asked appellant to obtain guns for him to sell even though appellant said he did not know where to obtain guns. Appellant talked frequently about guns with Joe (126-127).

On February 27, 1975, Joe approached Neal while the latter was at work and asked him to deliver something for him. Joe said he would pay Neal for delivering a shotgun. Later, after appellant got off from work, he drove with Joe to the West Side of Manhattan where Joe obtained the shotgun. They proceeded to Brooklyn where the sale went down in the early morning of February 28 (132-135).[6]

Appellant also testified that he had never sold guns before (139), and that the handgun he sold to Agent McCann at an earlier meeting was illegally obtained on the street (127, 129). Appellant Neal claimed that the informant, Joe, gave him the shotgun he sold to Agent McCann on February 28 (124), and that he split the proceeds from the sale of the handgun and the shotgun with Joe (130-131, 134-135). But Agent McCann testified

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[6] On cross-examination, Neal admitted that the shotgun he sold was not registered to him, and he knew that the transaction was illegal (145-146, 174).

on this point that he never gave Joe permission to supply Neal with a shotgun to sell. Neither did Joe ever tell Agent McCann that he had supplied Neal with a shotgun to sell (221). The only arrrangement the agent had with Joe was to pay him up to $50 for expenses for each case he worked on for ATF.[7]

Neal admitted meeting nine or ten other times with Agent McCann (158) and sometimes requested Joe to set up the meeting (159). Neal recalled that he "may have" told McCann that he (appellant) needed front money to buy in quantity (159-160), and also "may have" informed Agent McCann about a North Carolina connection (160).

Neal also testified on cross-examination that before Joe suddenly pulled out the weapon that appeared to be a M-16 and announced he was a firearms dealer, Joe had never talked about guns with appellant (162). When Joe pulled out the weapon, appellant testified he stated to Joe: "You got a lot of things going for yourself" (162).

Neal further testified that when he and Joe first talked about firearms Joe claimed that he had very good connections (143). Despite this assertion, Joe asked Neal for weapons because "he didn't have them (i.e. the connections) anymore" (143). The connections "were all out" of weapons (163). But soon after asking appellant to get weapons because his contacts could not

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[7] Joe could receive a "reward" for making a good case, and had, in fact, received a $100 "reward" for the work he did in the instant case. In addition to the investigation underlying the instant case, Joe worked on five other cases for ATF over a six month period. The total amount of money he received, including "rewards" and expenses, over the six months period during which he worked as an informer for ATF was between $425 and $475. He supported himself by working in a clothing store (99-104, 111).

supply them, Joe nonetheless was able to obtain the shotgun that was later sold to Agent McCann (144).

Appellant was cross-examined about the two friends that were with him when the two sales were consummated. He stated that the person in the car with him when the handgun was sold on February 25, 1975 was a friend (147) whom he had seen every day for two or three weeks (149). They often had a drink together after work, and, in fact, spent appellant's proceeds from the gun sale on liquor after the handgun deal of February 25 was transacted (149, 151). Appellant brought this friend along as a lookout, so he would "feel safer" (148-149); he wanted someone he knew well in the car (148). But despite the trust appellant allegedly reposed in this friend, he did not even know the friend's last name; nor did he know where he worked (147, 149, 152).

The "friend" who was with Neal when he sold the shotgun to Agent McCann on February 28 was a person appellant knew only at "face value", someone who flagged down appellant's car on the way to the sale in order to flee from the scene of a fight (152, 176). Joe was in the car with appellant at the time, but Joe did not complain about having a stranger with him. Neal never told this unidentified male what was about to occur. The "friend" never asked what was happening, and never even asked why he was suddenly asked to leave the car with Joe and walk around the block at 2:30 A.M. in the middle of Brooklyn (153-154).

Appellant claimed that he had driven Joe to that meeting because Joe did not have a car. But Neal did not think to inquire why Joe did not simply ask to borrow the car (142-143). Neal thought it was "strange" that Joe never asked to participate in the gun sale since Agent McCann knew he was there; Neal never asked Joe

for an explanation (169-170), nor did he ever ask Joe from whom he obtained the shotgun. Neal testified, "He offered to pay me $50, so I did it." (142).

In sum, Neal's testimony as a whole did not contradict in any significant manner the government's evidence that Neal was ready and willing at all times to engage in the criminal activity for which he was convicted.

ARGUMENT

The court properly refused to instruct the jury that it must acquit the defendant if it believed that the government informant supplied defendant with the contraband.

Appellant testified at trial that the government informant gave him the sawed-off shotgun he sold to undercover Agent Frank McCann. Appellant now asserts that the jury should have been instructed to acquit defendant simply on the basis of a belief that the government supplied the contraband. On this issue, counsel argues, appellant's predisposition to commit the crime is irrelevant.

Two distinct views of the entrapment defense have evolved. One view holds that the focus should be on the government's activity; overzealous government participation in the crime constitutes a violation of due process and defendant becomes entitled to an acquittal as a matter of law. The second view of entrapment centers on defendant's readiness and willingness to commit the crime charged. It is defendant's conduct, his guilt or innocence, which is crucial.

A divided United States Supreme Court has several times determined that the "predisposition" view should

be the focus of the entrapment defense. In a recent opinion, *United States* v. *Russell*, 411 U.S. 423, 433 (1973), the Court reaffirmed its adherence to the predisposition theory. *See* also *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932).

After *Russell*, it would appear that only outrageous government conduct should result in an acquittal based on due process grounds. *See United States* v. *McGrath*, 494 F.2d 562 (7th Cir. 1974) (On remand in view of the *Russell* case, the court reversed a prior decision, stating that after *Russell*, it is evident that only shocking government conduct should result in an acquittal as a matter of law). Although some Circuits have determined that where the government supplied the contraband, the defendant must be acquitted, *see, e.g., United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States* v. *Mosley*, 496 F.2d 1012 (5th Cir. 1974); *United States* v. *West*, 511 F.2d 1083 (3d Cir. 1975); most Circuits appear to be of a contrary view. *See, e.g. United States* v. *Hampton*, 507 F.2d 832 (8th Cir. 1974), *cert. granted*, 420 U.S. 1003 (1975); *United States* v. *McGrath, supra; United States* v. *Spivey*, 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975); *United States* v. *Johnson*, 484 F.2d 165 (9th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *Cf. United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). The Supreme Court has granted certiorari to resolve this conflict in the Circuits. *United States* v. *Hampton*, 507 F.2d 832 (8th Cir.), *cert. granted*, 420 U.S. 1003 (1975).[8]

It should be noted at the outset, that in the case at bar, it was clear that appellant was ready and willing to commit the offense for which he was convicted. (See

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[8] A copy of the Solicitor General's brief in *Hampton* has been forwarded to the Court and opposing counsel.

275-281). Appellant's own testimony at trial concerning the sale of the shotgun to Agent McCann reflects his willingness to commit the act. He testified: "He (*i.e.* the informant) offered to pay me $50 so I did it." (142).

The court was so convinced of appellant's predisposition to commit the crime charged that he stated:

> ". . . to me it's about the weakest entrapment case I've ever sat on in my whole entire life. I don't see where you're entitled to a charge. There is no question of predisposition." (180).

Later, he stated, ". . . I feel so strongly that it wasn't there was no entrapment here." (190). The court felt it was almost "improper" to charge entrapment (187; see also 190, 191, 192, 201, 205). Under these circumstances, the issue of entrapment probably should not have been presented to the jury. *See, e.g., United States* v. *Licursi*, 525 F.2d 1164, (2d Cir. 1975); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975); *United States* v. *Ortiz*, 496 F.2d 705 (2d Cir. 1974); *United States* v. *Greenberg*, 444 F.2d 369, 371-372 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Nieves*, 451 F.2d 836 (2d Cir. 1971); *United States* v. *McMillan*, 368 F.2d 810, 812 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *United States* v. *Riley*, 363 F.2d 955, 959 (2d Cir. 1966). The court decided, nonetheless, to submit the issue of entrapment to the jury because it was "safer" to do so (206).

Thus, one must weigh appellant's claim—that the Government's alleged conduct, alone, entitled him to an acquittal—not only in the light of the *Russell* case, but also against the record which clearly demonstrated appellant's predisposition.

The courts that support appellant's position appear to hold that if the government does not rebut defendant's

assertion that the government supplied the contraband, defendant should be acquitted as a matter of law. *See, e.g., United States* v. *Bueno, supra*, 447 F.2d at 906. If the government contests the allegation, the jury should determine whether the government supplied the contraband and be directed to acquit the defendant if it finds that the government did supply the contraband. *See, e.g., United States* v. *Mosley, supra*, 496 F.2d at 1015. The government must make "some showing contrary to the testimony of the accused . . ." to reach the jury on the issue. *United States* v. *West, supra*, 511 F.2d at 1087.

Acceptance of the *Bueno-Mosley-West* position—what may be styled the Fifth Circuit view—would necessitate a reversal of the law in this Circuit. In *United States* v. *Rosner, supra*, 485 F.2d at 1223, this Court stated that "if predisposition is proved, the judgment of conviction will generally stand regardless of the Government's activity." *See also United States* v. *Barrera*, 486 F.2d 333, 338 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

Concededly, appellant is entitled to an acquittal as a matter of law when governmental conduct is "so outrageous that due process principles would absolutely bar the Government from invoking the judicial process to obtain a conviction. . ." *United States* v. *Russell, supra*, 411 U.S. at 431-432. And, in fact, the Second Circuit has stated its willingness to overturn a conviction for such "outrageous" government conduct. *See United States* v. *Archer*, 486 F.2d 670, 677 (2d Cir.), *pet for reh. denied*, 486 F.2d 683 (1973). But in cases involving allegedly "outrageous" governmental conduct, the issue would be decided as a matter of law and not by the jury as appellant requests in the case at bar.

Even assuming appellant's statement that the informant gave him the shotgun was true, such an act would hardly amount to the "outrageous" government conduct condemned by this court in *Archer*.

In the instant case, in contrast to *Archer*, government officials took no part in the alleged activity. If there was any misconduct, it was misconduct of an informant disobeying the instructions given him by a government agent. Agent McCann testified he neither instructed the informant to supply any contraband nor had any reason to believe the informant had in fact supplied the shotgun to appellant Neal (110, 211). This is in marked contrast to *Archer* where the condemned activity was engaged in by the prosecutors themselves. Of equal importance, in *Archer*, the governmental activity was conceded; that is hardly true in the case at bar. Appellant's attorney stated at trial that Neal's assertion about receiving the shotgun from the informant was "uncontested" (237). To the contrary, the prosecutor challenged the allegation in his summation (268-271) and the evidence and testimony adduced at trial controverted appellant's allegation.

Appellant's testimony on the issue in question was incredible for a myriad of reasons. (See prosecutor's summation 268-271). Moreover, appellant's account of what occurred was not only incredible, it was impossible.

Neal testified that in the evening of February 27, 1975, while he was at work as a bellman at the Hotel Collingwood, the informant asked him to deliver the shotgun:

> "Joe approached me earlier while I was at work and told me he wanted to deliver something, drop something for him." (132; See also 170).

Agent McCann testified that on the day in question, he was with Joe from 2:30 P.M. until 4:30 P.M. At 4:30

P.M., he walked with the informant up to the door of the Hotel Collingwood. He left informant outside and went in to see appellant. Neal told Agent McCann that he was working the four to midnight shift and would sell him a sawed-off shotgun after work at a designated place in Brooklyn. The sale of the shotgun took place early the next morning (February 28) at the place designated by appellant (46, 222-223). So, it was uncontested that Agent McCann was with the informant up until Neal started work. And Neal could not have seen the informant between the time he started work and the time he offered to sell Agent McCann the shotgun because Agent McCann was alone with Neal during that entire period of time.

Notwithstanding the inherently incredible nature of appellant's assertion about obtaining the shotgun from Joe, appellant might even have been entitled to a directed verdict of acquittal in the instant case if this Court were to adopt his legal theory. This is so because it does not yet appear to have been determined what constitutes the "sufficient evidence" the government must produce (*United States* v. *Hampton, supra,* 507 F.2d at 837, Heany, *J.* dissenting) to get to the jury in Circuits which follow appellant's legal theory. It would seem that appellant's willing dealings with Agent McCann would be "sufficient evidence" (*cf. United States* v. *West, supra,* 511 F.2d at 1087), but that is by no means certain. Since some courts have decided the issue as a matter of law, it seems clear that the government can not get to the jury merely because the jury could disbelieve the defendant's allegation. *But cf. United States* v. *Jett,* 491 F.2d 1078, 1080 (1st Cir. 1974).

The situation would be even more unjust if the informant was not available. In such a case, even a clearly predisposed defendant need only take the stand and testify that the informant provided the contraband to assure himself a good chance of acquittal. Even assum-

ing the government could still provide sufficient evidence, to "contest" the issue, it would be most difficult to prove where the contraband did come from. Since the government would have to prove beyond a reasonable doubt that the contraband was not supplied by a government agent (*United States* v. *West*, *supra*, 511 F.2d at 1086), the defendant would have a good chance of acquittal no matter how outrageous his allegation.

Lastly, it should be noted that appellant's counsel in the case at bar did argue to the jury that the appellant should be acquitted if the jury determined that the informant supplied the shotgun to appellant.[9] Despite the

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[9] The appellant requested that the court charge the jury that if it believes that the informant provided the shotgun to the appellant, it should acquit him. The Court refused to do so and the following colloquy took place:

> Mr. Chrein: Your Honor had ruled. I take exception and I ask may I argue that as a fairness approach in my summation to the jury without stating what the law is.
>
> The Court: No. I will not allow you to tell the jury about the law in any place.
>
> Mr. Chrein: I don't intend to say it is the law. Would the Court take exception to my argument to the Jury that as a matter of law one of the fundamentals of fairness, it is improper to supply the material for which——
>
> The Court: No.
>
> Mr. Gould: I have no objection to Mr. Chrein telling *part of the law* that acting——
>
> Mr. Chrein: I'm not.
>
> The Court: You want to discuss it, look what they did. They put this stuff in his way, no other way, he just decided to go through with it because they gave it to him.
>
> Mr. Chrein: I merely arguing inferences from fact.
>
> The Court: You cannot argue it because as a matter of law——
>
> Mr. Chrein: I will not.
>
> The Court: Which is not under the case that we're arguing on.
>
> Mr. Chrein: I've recorded my position on that. (Emphasis added) (212-213).

[Footnote continued on following page]

prosecutor's objection (212-213, 242-243), appellant's counsel did argue what he called the "fairness" issue to the jury without interruption from the court:

> "Well I would just like to bring up before closing a question of what—what I would like to argue and that is basic fairness. Well, if you're not convinced beyond a reasonable doubt that my client is the true provider of that shotgun. . . . Let's consider what's fair and what's not fair. . . . But, if Joe was in fact the man who provided my client with that shotgun and my client is being charged with the possession of that shotgun, I submit that it is the most gross act of unfairness for man who is acting as a Government informant and His Honor will charge I suspect that a person who is a Government informant, his acts are chargeable to the Government, whether the Government deliberately instructed him to do so or if he was acting on behalf of the Government. I don't say that agent McCann knew that this was going on, but I submit Joe knew what was going on. Joe had action. Joe had money to make. Joe was playing both ends and collecting your tax money on expenditures and collecting your money laid out for

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And later the following colloquy took place:

> Mr. Chrein: In other words I intend to give a very brief and generalized definition of entrapment indicating it is going to come from you.
>
> Mr. Gould: I have no objection to that.
>
> Mr. Chrein: The question of provisions, I normally don't resume (sic) in advance, there's no harm in it, the question of providing a gun by the informant and I will deal with that as a degree of fairness, not a question of law.
>
> The Court: Yes, fairness.
>
> Mr. Gould: Your Honor, I dislike ever objecting during summation. I guess the Court is on notice if Mr. Chrein starts going too far in that area—the Court will say something so I won't have to interrupt Mr. Chrein? (242-243).

> the purposes of that shotgun and pistol together. If Joe provided that shotgun to the defendant can you fairly convict the defendant for possession of that very thing the Government informant gave him. I submit to you to do so would be a gross abuse of fairness in this case. The Government has to prove that Mr. Neal is guilty. The Government—the defendant as His Honor will tell you and has told you before and he will tell you at the close of this case that the defendant does not have to prove that he is innocent. I submit and I submit that there is a reasonable doubt as to the defendant's guilt. Any reasonable doubt as to the defendant's guilt and according to the oath you took when you were sworn as jurors requires you to find the defendant not guilty." (261-263).

Thus, despite the fact that the court did not charge the jury that it should acquit if it found that the informant provided appellant with the shotgun, appellant's counsel nevertheless argued to the jury that if it so found it should acquit appellant "as a matter of fairness."

In sum, the law of this Circuit as it now stands is that the appellant is not entitled *per se* to an acquittal if it is determined that the informant supplied him with the shotgun. Moreover, any change in the law would result in extreme injustice in the case at bar and the establishment of an unjust and unwarranted policy in future cases where the informant is not available.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: February 27, 1976

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United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
DAVID S. GOULD,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of March 19 76 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Phylis Skloot Bamberger, Esq.
The Legal Aid Society
Federal Defender Services Unit, 509 US Courthouse,
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this
1st day of March 19 76

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977